IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

WILLIS HEADIN,	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 7:04-CV-00460**
	)	
JO ANNE B. BARNHART,	)	**By: Michael F. Urbanski**
COMMISSIONER OF SOCIAL	)	**United States Magistrate Judge**
SECURITY,	)	
Defendant.	)	

REPORT AND RECOMMENDATION

Plaintiff Willis Headin ("Headin") brought this action pursuant to 42 U.S.C. § 405(g) for review of the final decision of the Commissioner of Social Security denying his claim for disability insurance benefits ("DIB") and Social Security Income ("SSI") under Title II and XIV of the Social Security Act, 42 U.S.C. §§ 401-433, 1381-1383f. This matter is before the court for report and recommendation on cross motions for summary judgment. (Docket Nos. 14 and 20) For the reasons outlined below, it is the recommendation of the undersigned that this case be affirmed as substantial evidence exists to support the decision of the Commissioner denying benefits.

It is clear from the record that plaintiff has medical problems, but no doctor has opined that plaintiff is unable to work. Plaintiff raises two issues in this case. The first is whether plaintiff meets or equal the criteria for Listing 9.08A. Because the law requires plaintiff to demonstrate that all criteria relevant to the Listing are met, and because plaintiff did not meet the criteria for significant and persistent disorganization of motor function in two extremities, plaintiff's first legal argument is without merit. Plaintiff's second argument is that the ALJ's questioning of the vocational expert ("VE") at the hearing did not include all of the appropriate functional limitations found by a consultative examination

performed after the administrative hearing. Close review of the record reveals, however, that plaintiff's impairments resulting from his diabetes were fully explored at the administrative hearing at which the vocational expert testified. As such, there is no basis to suggest any change to the administrative decision.

STANDARD OF REVIEW

The court's review is limited to a determination as to whether there is a substantial evidence to support the Commissioner's conclusion that plaintiff failed to meet the conditions for entitlement established by and pursuant to the Act. If such substantial evidence exists, the final decision of the Commissioner must be affirmed. Hays v. Sullivan; 907 F.2d 1453, 1456 (4th Cir. 1990); Laws v. Celebrezze, 368 F.2d 640 (4th Cir. 1966). Stated briefly, substantial evidence has been defined as such relevant evidence, considering the record as a whole, as might be found adequate to support a conclusion by a reasonable mind. Richardson v. Perales, 402 U.S. 389, 401 (1971).

FACTUAL AND ADMINISTRATIVE HISTORY

On the date of the ALJ's decision, plaintiff was forty-seven years of age, had the equivalent of a high school education, and had past work experience as a maintenance worker, laborer, warehouseman, and cook. (Administrative Record, hereinafter "R.", at 17, 67) Plaintiff alleges disability commencing on August 15, 2000. (R. 49, 218) Plaintiff filed applications for DIB and SSI on October 17, 2001. (R. 49-51, 218-220) The claim was denied initially and on reconsideration, and plaintiff requested a hearing to review the claim. (R. 27-31, 34-35, 224-225) The ALJ's decision that plaintiff was not disabled became final when it was approved by the Appeals Council on June 30, 2004. (R. 5-8)

It is clear from the record that plaintiff suffers from a number of medical conditions. Medical evidence before the court at the time of the hearing included reports showing a history of diabetes and hypertension. (R. 85-88, 91-117, 144-75, 201-10) The record also indicates that plaintiff has a history of transient ischemic attacks as well as a history of drug and alcohol abuse. (R. 85-88, 91-117, 144-75, 201-10) This said, three residual functional capacity assessments by state physicians indicated that plaintiff's ability to work was not severely compromised. (R. 118-225, 126-29, 176-184, 185-200)

After reviewing the evidence of record, the ALJ determined that plaintiff suffered from diabetes mellitus and hypertension, severe impairments under the Act. (R. 18) The ALJ also determined that plaintiff has the residual functional capacity ("RFC") to perform sedentary work. (R. 19) Based upon testimony of the VE, the ALJ determined that plaintiff could perform jobs that exist in significant numbers in the national economy. (R. 20)

Because he believed plaintiff's medical history was not adequate to determine his claims, following the administrative hearing, the ALJ referred plaintiff for a consultative evaluation to Dr. Hetzal Hartley, M.D. (R. 289, 211) Dr. Hartley's report indicates that plaintiff states that his diabetes has been poorly controlled, and that he has numbness all the way up his legs and in his fingers, weakness in the right side of his body, headaches, and uncontrolled high blood pressure. (R. 211) Following a physical examination, Dr. Hartley concluded that

> Mr. Headin appears to have poorly controlled diabetes, poorly controlled hypertension. [He] seems to, at least in the past, have been extremely noncompliant with his medical regime. Because of this, he has a fairly dense peripheral neuropathy secondary to his diabetes. From history, it sounds like he may have had some light TIAs on the

> right side with some loss of coordination and balance. **However he has intact motor strength in both the upper and lower extremities, and seems to be capable of doing sedentary or light work within the economy. However, he would be extremely limited in his employability due to his education level and general poor health and full time employment would be unlikely considering the severity of his diabetes.**

(R. 213) (emphasis added).

The record does not contain any medical source statements or opinions indicating that plaintiff is unable to perform any substantial gainful activity. Of all of the assessments of plaintiff that were performed by physicians in this case, Dr. Hartley's is the only one based on direct examination of him. Although Dr. Hartley's evaluation is more restrictive than the reviewing state agency physicians, (see, e.g., R. 118-225, 126-29, 176-184, 185-200), even Dr. Hartley considered plaintiff to be equipped with the ability to perform light and sedentary work, albeit with an apparent qualification that it is unlikely anyone would hire him. (R. 213)

ANALYSIS

A. Plaintiff Does Not Meet or Equal Listing 9.08A

Plaintiff argues that plaintiff's condition meets or equals Listing of Impairments 9.08A. When a claimant produces evidence that he has satisfied the listing criteria, and has or will do so for a period of at least twelve months, he is deemed disabled. See Todd v. Apfel, 8 F. Supp. 2d 747, 754 (W.D. Tenn. 1988) (citing Johnson v. Sec'y of Health & Human Servs., 794 F.2d 1106 (6th Cir. 1986)).

In order to meet a listing, a claimant must show that all criteria contained in the listing are met. Sullivan v. Zebley, 493 U.S. 521, 530 (1990). To meet or equal section 9.08A of the listings, the evidence must demonstrate diabetes mellitus with neuropathy demonstrated by significant and persistent

disorganization of motor function in two extremities resulting in sustained disturbance of gross and dexterous movements, or gait and station, as defined in section 11.00C. See 20 C.F.R. § 404, subpt. P, app. 1, § 9.08(A). According to the regulations, "persistent disorganization" in the form of paresis or paralysis, tremor or other involuntary movements, ataxia and sensory disturbances (any or all of which may be due to cerebral cerebellar, brain stem, spinal cord, or peripheral nerve dysfunction) which occur singly or in various combinations, frequently provides the sole or partial basis for decision in cases of neurological impairment. See 20 C.F.R. § 404, subpt. P, app. 1, § 11.0(C). The assessment of impairment depends on the degree of interference with locomotion and/or interference with the use of fingers, hands, and arms. Id.

The parties agree that plaintiff suffers from diabetes mellitus. They disagree over whether plaintiff has demonstrated "significant and persistent disorganization of motor function in two extremities resulting in sustained disturbance of gross and dexterous movements, or gait and station." In support of the position that plaintiff has met this second prong, plaintiff notes that: (1) Dr. Zelasko treated the plaintiff for painful sores on both feet and that plaintiff's painful lesions were debrided, (R. 100); (2) that plaintiff received treatment for diabetic neuropathy at Community Care Center from June 7, 2001 through May 21, 2002, (R. 144-75); (3) that plaintiff was treated at Kuumba Community Health Clinic from June 20, 2002 through March 28, 2003 due to uncontrolled diabetes mellitus, calluses, bunions, hammer toes, and diabetic foot problems, (R. 201-210); and that (4) Dr. Hartley noted signs of retinopathy secondary to diabetes and poorly controlled hypertension. See Pl. Mem. Supp. Mot. Summ. J. at 10-11. In response, defendant notes that Dr. Hartley indicated that plaintiff had intact

motor strength in both the upper and lower extremities and seemed to be capable of doing sedentary or light work. See Def. Mem. Supp. Mot. Summ. J. at 9 (discussing (R. 213)).

No doctor found that plaintiff suffered from any "significant and persistent disorganization in motor function" sufficient to satisfy Listing 9.08A. Indeed, Dr. Hartley found plaintiff's motor strength to be intact in his upper and lower extremities. (R. 213) The ALJ found that there was no factual support that the listing could be met because plaintiff's muscle strength in his upper and lower extremities is intact. See Cook v. Heckler, 783 F.2d 1168, 1172 (4th Cir. 1986) (requiring the ALJ to fully analyze whether a claimant's impairment meets or equals a listed impairment "where there is factual support that a listing could be met."). In this respect, the ALJ's opinion is supported by substantial evidence.

B. The Hypothetical Question Posed to the VE

Plaintiff also argues that the ALJ accorded great weight to Dr. Hartley's medical findings, but as these findings were not available at the time of the ALJ's decision, the testimony of the VE, and thus the Commissioner's evidence at Step 5, is undermined.

Under the Act, once plaintiff established that he could not perform his past relevant work, the Commissioner has the burden at Step 5 of showing that plaintiff can do other work. 20 C.F.R. §§ 404.1520(f), 416.920(f). In this case, the ALJ relied on testimony from a VE to identify jobs that plaintiff could perform in the national economy. Here, the ALJ asked the VE whether jobs existed in the national economy for an individual of the same age, education and work history of plaintiff; who had the residual functional capacity for only sedentary work activity; who should stand no more than two hours but of an eight-hour workday and requires breaks of fifteen minutes at two hour

intervals. (R. 286) Additionally, due to the presence of diabetes, the hypothetical individual should not be exposed to extremes of temperature, particularly heat, and should not be at risk of injury. (R. 286) Moreover, the hypothetical individual should not work in the food service industry due to hepatitis. (R. 286) The VE testified that such an individual could perform the jobs of bench worker, assembler, and parts inspector, for which thousands of jobs exist in the national economy. (R. 287-88)

At the hearing, plaintiff's attorney asked the VE whether an individual situated as is plaintiff, but having the need to lie down and nap for about two hours out of an eight-hour day, to be on his feet for only fifteen minutes at a time, and who also complained of pain and numbness in his feet, that would limit his ability to concentrate and keep working at a uniform pace, be able to perform any of these job functions. (R. 288) The VE responded that if the two-hour nap had to occur during the eight-hour workday, this would "basically erode the job base." (R. 289)

While that certainly is true, there is no factual support in the record to suggest that plaintiff met his burden of establishing such a limitation. The record contains no opinion from any doctor indicating that plaintiff was totally disabled, that plaintiff had to take a two-hour nap in the middle of the day, or that pain in plaintiff's feet limits his ability to concentrate or to work at a uniform pace. Rather, these limitations are based only on plaintiff's subjective account of how he spends his days. (R. 281) The ALJ need not include a limitation, lacking any objective medical findings or support, in a hypothetical question to a VE. See Walker v. Bowen, 889 F.2d 47, 50-51 (4th Cir. 1989)(stating that hypothetical questions must include those impairments supported by the evidence).

Procedurally, this case is out of the norm as the ALJ referred plaintiff for a consultative examination with Dr. Hartley after the administrative hearing. Plaintiff contends therefore that the

Commissioner's decision was not supported by substantial evidence because two impairments noted by Dr. Hartley were not reflected in the hypothetical posed to the VE. These two findings are that plaintiff can stand and/or walk "less than two hours in an 8-hour workday," (R. 214), and that he has limited feeling and numbness in his fingers. (R. 216).

When the hypothetical question was posed to the VE, the issue of the ability to stand was specifically addressed, albeit not phrased as plaintiff suggests was required. While Dr. Hartley checked a box on a form indicating that plaintiff can stand/walk for "less" than two hours, (R. 214), the hypothetical question posed to the VE contemplated that the person could stand "no more" than two hours out of eight. (R. 286) Plaintiff's argument is one of semantics. There is no material difference between a medical evaluation stating that plaintiff can stand "less than two hours" and the phrasing of the hypothetical question at "no more than two hours."

Plaintiff points to Social Security Ruling 96-9p as authority for the position that the box Dr. Hartley checked rendered plaintiff incapable of performing sedentary work, but this ruling hardly supports his argument. Indeed, as reflected below, SSR 96-9p requires an individual to stand and walk "a total of approximately 2 hours." That ruling expressly recognizes that a person who "can stand and walk for a total of slightly less than 2 hours per 8-hour workday" can perform sedentary work." West's Social Security Rep. Serv., Rulings, (2003 Supp.) at 157. As to the standing and walking category of Exertional Limitations and Restrictions, SSR 96-9p provides as follows:

> Standing and walking: The full range of sedentary work requires that an individual be able to stand and walk for a total of approximately 2 hours during an 8-hour workday. **If an individual can stand and walk for a total of slightly less than 2 hours per 8-hour workday, this, by itself, would not cause the occupational base to be**

> **significantly eroded.** Conversely, a limitation to standing and walking for a total of only a few minutes during the workday would erode the unskilled sedentary occupational base significantly. For individuals able to stand and walk in between the slightly less than two hours and only a few minutes, it may be appropriate to consult a vocational resource.

Id. at 157-58 (emphasis added). Contrary to plaintiff's argument, there is no bright line drawn by the regulations or rulings between a person who can work for "less than two hours," and one who can work "no more than two hours." The regulatory scheme is neither as semantical or inflexible as plaintiff's argument suggests. Consistently, Social Security Ruling 83-10, discussing sedentary work, states that "[s]ince being on one's feet is required 'occasionally' at the sedentary level of exertion, periods of standing or walking should **generally** total no more than about 2 hours of an 8-hour workday...." West's Social Security Rep. Serv., Rulings 1983-1991, Ruling 83-10 at 29 (1992)(emphasis added).

Further, both of the state agency physicians reviewing plaintiff's medical records indicated that he could stand or walk for six hours out of an eight-hour day, not the "less than two hours" indicated in Dr. Hartley's report. See (R. 119, 177) (stating that plaintiff can stand or walk for six hours of an eight-hour day). The language of the hypothetical question is consistent with all of the evidence in the case, particularly when taken in combination with the medical evaluations performed by state agency physicians asserting that plaintiff was able to stand and/or walk for six hours out of an eight-hour day. In short, there is no basis to reverse or remand this case on the issue of plaintiff's ability to stand or walk as the Commissioner's decision that plaintiff is capable of performing sedentary work is supported by substantial evidence.

The issue of numbness in extremities likewise does not require reversal or remand. Dr. Hartley noted in his Medical Source Statement that Headin had unlimited manipulative function in reaching all directions (including overhead), handling (gross manipulation), and fingering (fine manipulation). At the same time, Dr. Hartley noted that Headin had limited feeling (skin receptors) in his hands and noted "numbness in fingers." Dr. Hartley's report further contains the notation "NONE" next to a checked box entitled "Feeling." (R. 216)

Plaintiff complains that the hypothetical question posed to the VE does not specifically take into account the numbness noted by Dr. Hartley. While the hypothetical does not specifically mention numbness in fingers, the symptoms associated with Headin's severe diabetes was addressed both in Headin's testimony at the hearing and in general terms in the hypothetical question. At the administrative hearing attended by the VE, Headin testified as to his work history and impairments, including problems associated with his diabetes. In particular, Headin testified that he had calluses on his feet and hands, affecting in particular his ability to walk. (R. at 270-71) Headin also testified as to periodic numbness and burning in his feet, (R. 271-73), and in his hands lasting two to three minutes which dissipated upon rubbing. (R. 274-75) While the hypothetical question did not mention numbness in particular, it did consider a person having severe diabetes, as follows: "Additionally, because of the presence of diabetes, which appears to be somewhat extreme, I would not want him to be subjected to extremes of temperature, particularly heat. Nor would I want him to be in a position where he would be at risk of injury, particularly to his feet. In a sedentary job that is highly unlikely, but there should be nothing about the job that would be – put his feet at risk for injury, because of his level of diabetes." (R. 286) Thus, at the administrative hearing, Headin testified as to the symptoms

associated with is diabetes, including some hand numbness, and the hypothetical question expressly took into account an extreme level of diabetes and limitations associated therewith. As the hypothetical question was phrased to take into consideration Headin's abilities and limitations, see Walker v. Bowen, 889 F.2d 47, 50 (4th Cir. 1989), his objection to the hypothetical question is unfounded.

C. Dr. Hartley's Employability Opinion

At the conclusion of his narrative report, Dr. Hartley opined that plaintiff "seems capable of doing sedentary or light work within the economy." (R. 213) In the next breath, however, the report states that "he would be extremely limited in his employability due to his education level and general poor health and full time employment would be unlikely considering the severity of his diabetes." Id. Neither of these opinions, however, are controlling, however, as these issues are not medical in nature and are reserved for the Commissioner. See 20 C.F.R. §§ 404.1527(e), 416.927(e). Indeed, the aspect of Dr. Hartley's opinion favorable to Headin's disability claim - that it would be unlikely that any employer would hire Headin - is far afield from his area of expertise. As such, it too does not support any reversal or remand of this case.

CONCLUSION

For the reasons outlined above, it is clear that the decision of the Commissioner is supported by substantial evidence and is supported by correct legal principles. As such, it is RECOMMENDED that the Commissioner's motion for summary judgment be granted and this case dismissed and stricken from the docket of the court.

The Clerk is directed immediately to transmit the record in this case to the Hon. James C. Turk, United States Senior District Judge. Both sides are reminded that pursuant to Rule 72(b) they are

entitled to note any objections to this Report and Recommendation within ten (10) days hereof. Any adjudication of fact or conclusion of law rendered herein by the undersigned not specifically objected to within the period prescribed by law may become conclusive upon the parties. Failure to file specific objections pursuant to 28 U.S.C. § 636(b)(1)(C) as to factual recitations or findings as well as to the conclusions reached by the undersigned may be construed by any reviewing court as a waiver of such objection.

The Clerk of the Court hereby is directed to send a certified copy of this Report and Recommendation to all counsel of record.

Enter this 7th day of June, 2005.

/s/ Michael F. Urbanski
United States Magistrate Judge